2001

Ellen Anderson v. Eugene E. Doms : Brief of Appellant

Utah Court of Appeals

Larry R. Keller; Cohne, Rappaport and Segal; Attorney for Defendants/Appellant/Cross-Appellee.
Irving A Kirkham; Larry A. Kirkham; Cannon, Kirkham and Robinson; Attorney for Plaintiffs/Appellees/Cross-Appellant.

IN THE UTAH COURT OF APPEALS

ELLEN ANDERSON, as Personal Representative of the Estate of D.C. Anderson; ELLEN ANDERSON personally; DAN SCOTT and JEANNE SCOTT, Plaintiffs, Appellees, v. EUGENE E. DOMS and MICHAEL R. McCOY, Defendants, Appellant.	Court of Appeals Case No [illegible]010712-CA

BRIEF OF APPELLANT

Appeal from a Modified Judgment and Minute Entry of the Third Judicial District Court in and for Summit County, State of Utah, dated July 7, [illegible] the Honorable Robert K. Hilder, Judge.

IRVING H. BIELE #0317
1235 East 200 South, #301
Salt Lake City, Utah 84102
Telephone: (801) 532-5055

LARRY A. KIRKHAM #1832
871 East 9400 South
Sandy, Utah 84094
Telephone: (801) 255-7475

Attorneys for Plaintiffs, Appellees

LARRY R. KELLER #[illegible]
COHNE, RAPPAPORT & SEGAL, P.C.
525 East 100 South, 5th Floor
Salt Lake City, Utah 84102
Telephone: (801) 532-266[illegible]

Attorney for Defendant, Appellant

IN THE UTAH COURT OF APPEALS

ELLEN ANDERSON, as Personal Representative of the Estate of D.C. Anderson; ELLEN ANDERSON personally; DAN SCOTT and JEANNE SCOTT, Plaintiffs, Appellees, v. EUGENE E. DOMS and MICHAEL R. McCOY, Defendant, Appellant.	)	Court of Appeals Case No. 20010712-CA

BRIEF OF APPELLANT

Appeal from a Modified Judgment and Minute Entry of the Third Judicial District Court in and for Summit County, State of Utah, dated July 7, 2001, the Honorable Robert K. Hilder, Judge.

IRVING H. BIELE #0317
1235 East 200 South, #301
Salt Lake City, Utah 84102
Telephone: (801) 532-5055

LARRY A. KIRKHAM #1832
871 East 9400 South
Sandy, Utah 84094
Telephone: (801) 255-7475

Attorneys for Plaintiffs, Appellees

LARRY R. KELLER #1785
COHNE, RAPPAPORT & SEGAL, P.C.
525 East 100 South, 5th Floor
Salt Lake City, Utah 84102
Telephone: (801) 532-2666

Attorney for Defendant, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

RULES Page

STATUTES

OTHER AUTHORITY

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this case pursuant to Utah Code Ann. § 78-2-2(4) (2001), which grants the Court of Appeals appellate jurisdiction over cases transferred to it by the Utah Supreme Court. This is an appeal from a Modified Judgment and Minute Entry of the Third Judicial District Court. The Utah Supreme Court had jurisdiction over the case pursuant to Utah Code Ann. § 78-2-2(3)(j) (2001). The Supreme Court transferred the case to this court on October 19, 2001.

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

The following issues are presented for review in this brief:

1. Did the Trial Court err in denying Appellant Doms' Motion to Amend Judgment Pursuant to Rule 59 U.R.C.P. alleging that the Court failed and refused to grant Appellant Doms all amounts paid under the Trust Deed Note when the Court ordered rescission of the contract in this matter?

2. Did the Trial Court err by failing to implement the Final Decision of the Utah Court of Appeals in this matter dated June 24, 1999?

3. The standard on appeal for each of these cases is the legal error standard, pursuant to *Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180, 185 (Utah Ct. App. 1997) ("Pronouncements of an appellate court on legal issues . . . become the law of the case and must be followed in subsequent proceedings; . . . (thus) the lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces").

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any determinative constitutional provisions, statutes or rules are set forth in the addendum to this brief.

STATEMENT OF THE CASE

This appeal is from a Final Judgment (Add. 1 and 2) of the Third Judicial District Court, Summit County, State of Utah. The statement of the case is more specifically spelled out in the following Statement of Facts.

STATEMENT OF FACTS

A concise statement of facts material to consideration of the questions presented is as follows:

a. In March 1982, Appellees Dan and Jeanie Scott, Ellen Anderson and D.C. Anderson, Ellen Anderson's now deceased husband, sold a parcel of property known as Rossi Hills (the Property) in Park City, Utah to Doms and Michael R. McCoy for residential development. (R. at 6744, F. of F. 17.)

b. In connection with this sale, Appellees executed a Warranty Deed that included a covenant against encumbrances. (R. at 6743-44, F. of F. 1, 4.) Doms and McCoy executed a Trust Deed and Trust Deed Note to secure payment of the balance owed on the purchase price of $194,250.00. (R. at 6747, F. of F. 19, 20.)

c. McCoy no longer has any interest in the property and is not involved in this appeal. (R. at 7185-86)

d. The purchase price for the Rossi Hills property was the amount of $276,750.00. (R. at 6747, F. of F. 17.)

e. The Appellees received the sum of $10,000.00 as earnest money in the aforementioned transaction, and a down payment of $72,500.00, leaving a balance due on the purchase price of $194,250.00. (R. at 6747, F. of F. 18.)

f. The Trust Deed and Trust Deed Note in the amount of $194,250.00 executed by Doms and McCoy called for monthly interest payments of $2,266.25 up to and including January 10, 1985. (R. at 6747, F. of F. 19, 20.)

g. All of these monthly payments were received by Appellees, in the total amount of $72,520.00. (R. at 6747, F. of F. 22.)

h. The entire unpaid balance of $194,250.00, together with interest, was due on January 25, 1985. (R. at 6747, F. of F. 19.)

i. In late 1984 or early 1985, Doms' attorney informed him that several encroachments and easements existed on the property. (R. at 7504-05.) As a result, Doms did not make the scheduled balloon payment on the property on January 25, 1985, and attempted to deed the property back to Appellees in return for cancellation of the Trust Deed Note. (R. at 7512-14.)

j. Appellees did not respond to this offer and, in June 1985, filed a complaint seeking to foreclose on the property. (R. at 1.) Two years later, Appellees obtained a default judgment against Doms and McCoy because they failed to file an answer in response to the Appellees' Complaint. (R. at 34-40.)

k. Nine days after entry of the default judgment, Doms filed an Answer and Counterclaim to Appellees' Complaint. (R. at 41-44.) Approximately four months later, the trial court entered an Order setting aside the default judgment against Doms on the condition that Doms pay all attorney's fees incurred by Appellees in obtaining the default judgment. (R. at 76-78.) However, the court reserved a final ruling on the award of these fees until final disposition of the case on the merits. (R. at 245-47.)

l. In May 1987, the property was sold to Summit County in a foreclosure sale for the non-payment of property taxes. (R. at 3115.) At that time, title to the property was held by Domcoy, a corporation formed by Doms and McCoy, to which they had transferred their interest in the property. (R. at 7182-84.)

m. After Doms paid all delinquent taxes, penalties, interest, and costs, Summit County conveyed the property to Domcoy by quit claim deed. (R. at 3116-17; 3160-61.) Domcoy then conveyed the property to Doms. (R. at 3117.)

n. On remand, the trial court found that the conveyance of the property from Summit County to Doms after the tax sale resulted in Doms holding "clear title to the property." (R. at 6692.)

o. In the meantime, Appellees had filed a separate action (Civil No. 10066 consolidated with the instant action, Civil No. 8339) challenging the tax sale and subsequent purchase of the property by Summit County, seeking to quiet title to the property in their favor. Upon stipulation of Summit County, Plaintiffs and Doms, the trial court set aside the tax sale, and the tax sale was found to have no effect whatsoever

on the ultimate outcome of this case. *Anderson v. Doms*, 1999 UT App 207, ¶12, 984 P.2d 392 (Add. 3).

p. In July 1988, Doms had amended his Counterclaim, seeking rescission of the contract or, in the alternative, damages for breach of implied covenants, breach of contract, fraud, and misrepresentation. (R. at 237-42.)

q. The trial was bifurcated and a three day trial was held on April 17-19, 1990 on the issue of rescission of the contract. (R. at 4188-95.) Appellees argued, on the basis of laches, that Doms was prohibited from rescinding the contract because there was an unreasonable delay between the time Doms learned of the basis for rescission and his attempt to rescind the contract. (R. at 4191.) The trial court subsequently issued a Memorandum Decision, finding that because Doms unreasonably delayed seeking rescission, laches barred rescission of the contract. (R. at 4194.)

r. The remainder of the trial was held on August 21-24, 1990 and focused on the issue of whether Doms was entitled to damages as a result of the encumbrances on the property. (R. at 7753-8285.) The trial court later held a hearing on the issue of attorney's fees. (R. at 6360-6540.) In its Second Amended Findings of Fact and Conclusions of Law and Second Amended Judgment, the trial court, based upon laches, denied Doms' request for rescission and awarded Doms $83,000.00 in damages as a result of the encumbrances on the property and $101.50 in costs. (R. at 6874-6906.) The trial court also awarded $41,333.20 in attorney's fees and costs, plus interest to Appellees. (R. at 6898.)

s. Both parties appealed the trial court's decision on several grounds. The Utah Court of Appeals subsequently issued an unpublished Memorandum Decision holding that the trial court improperly applied the doctrine of laches to bar rescission of the contract without first entering Findings of Fact regarding whether Appellees were prejudiced by Doms' delay in seeking rescission. *Anderson v. Doms*, No. 920653-CA, slip op. at 2-3 (Utah Ct. App. Nov. 4, 1994) (unpublished memorandum decision).

t. Consequently, the Utah Court of Appeals remanded the case to the trial court for further findings on the issue of prejudice, stating, "If the trial court cannot find from the evidence presented that the [plaintiffs] were prejudiced by the delay, the equitable doctrine of laches should not bar the remedy of rescission." *Id.*

u. On remand, the trial court again refused to rescind the contract, concluding Appellees were prejudiced by Doms' delay in seeking rescission. A new appeal followed: *Anderson, et al. v. Doms, et al.*, 1999 UT App 207, 984 P.2d 392 (Add. 3).

v. The Utah Court of Appeals reversed and remanded to the trial court and drew the following conclusions:

i. "Although Doms failed to make payments required by the Trust Deed Note, he was excused from doing so as a result of Plaintiffs' breach of the covenant against encumbrances." *Id.* at ¶17.

ii. "Any prejudice that resulted from Doms' failure to make payments pursuant to the Trust Deed Note was precipitated by Plaintiffs' breach of warranty." *Id.*

iii. "The only theory Plaintiffs advance on appeal to bar rescission of the contract is laches. This theory fails, however, because Plaintiffs have not shown any prejudice. Therefore, Doms is entitled to rescind the contract as a remedy for breach of warranty." *Id.* at ¶19.

iv. "On remand, the trial court should determine what is necessary to restore the parties to the status quo at the time the parties entered into the contract. *See Bergstrom v. Moore*, 677 P.2d 1123, 1125 (Utah 1984)(affirming rescission of contract and placing parties in original positions by allowing recovery of payments already made under contract). In fashioning an appropriate remedy for rescission, the rule is equitable, and requires practicality in adjusting the rights of the parties. How this is to be accomplished, or indeed whether it can, is a matter which is within the discretion of the trial court under the facts as found to exist by the trier of fact. The trial court therefore has discretion to fashion an adequate and reasonable remedy so that an aggrieved party is adequately compensated for its loss, so long as that remedy is not duplicative (citing cases)." *Id.*

v. "In this case, Doms apparently made no improvements or changes to the property such that the parties could not be returned to their respective positions prior to entering into the contract. We therefore remand this issue to the trial

court for a determination and award to Doms of the net payments paid by him less rental value plus interest. *Id.* at 1125.

vi. "Doms is entitled to a refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and Domcoy." *Doms*, 1999 UT App 207, ¶21, n.12, 984 P.2d 392 (Add. 3).

vii. "Both parties appeal from the trial court's award of attorneys fees and costs. . . . Although Doms requests fees for pursuing his rescission remedy . . . he is not entitled to fees and costs incurred in conjunction with breach of the covenant against encumbrances. . . . We therefore do not award any attorneys fees to Doms." *Id.* at ¶22.

viii. "Regarding the trial court's award of fees and costs to Plaintiffs, we affirm the trial court's award of fees and costs incurred in obtaining the default judgment (citing cases). . . . However, because Plaintiffs are not the prevailing party, we vacate all other awards to Plaintiffs." *Id.* at ¶23.

ix. "Thus, we remand to the trial court for consideration of Plaintiffs' counsel's evidence regarding reasonable fees incurred in connection with obtaining the default judgment and an appropriate award based on that evidence." *Id.*

x. " . . . rescission of the contract in this case is consistent with Utah case law. Accordingly, the trial court should order rescission and determine an appropriate remedy in connection with rescinding the contract. . . . We also affirm the trial court's fee award to Plaintiffs incurred in connection with obtaining the default

judgment but vacate all other attorney fee awards to Plaintiffs . . . Reversed and remanded." *Id.* at ¶24.

w. Appellees petitioned the Utah Court of Appeals for rehearing, but in an Order dated August 18, 1999, the Court denied the Petition for Rehearing.

x. On January 27, 2000, the Utah Supreme Court denied the Petition for Certiorari filed by Appellees in this matter. (R. at 8582-83.)

y. On January 31, 2000, the Remittitur was issued from the Utah Court of Appeals to the trial court to implement the Opinion issued by the Utah Court of Appeals on June 24, 1999. (R. at 8584-95.)

z. The District Court, the Honorable Robert K. Hilder presiding, heard the argument of counsel regarding Appellant Doms' "Motion to Enter Judgment on the June 24, 1999 Decision of the Utah Court of Appeals" on June 29, 2000. (R. at 8833-34.) An oral ruling was issued by the Court at that time. (R. at 8833-34.)

aa. Appellant Doms filed his Motion to Amend Judgment pursuant to Rule 59 U.R.C.P. on or about July 27, 2000. (R. at 8848-51.)

bb. Appellees filed a "Motion to Expand or Broaden the Proposed Modified Judgment in Order to Properly Comply with the Order of the Court of Appeals" on or about September 28, 2000. (R. at 8898-8906.)

cc. The Court entered its Modified Judgment (Add. 1) and Minute Entry (Add. 2) on or about July 7, 2001 denying both Appellant's and Appellees' Motions. (R. at 8948-52.)

dd. Appellant filed his Notice of Appeal on or about August 1, 2001. (R. at 8956-58.)

ee. A Notice of Cross-Appeal was filed by Appellees on August 10, 2001. (R. at 8972-74.)

SUMMARY OF ARGUMENT

It is Appellant's position that this case can be quickly and easily disposed of by this Court. The Utah Court of Appeals (hereafter "this Court") clearly held in *Anderson v. Doms*, 1999 UT App 207, ¶19, 984 P.2d 392 (Add. 3), that rescission is an appropriate remedy in this case, and because of that fact, the trial court should have restored the parties to their original positions prior to the contract entered into in March of 1982. In order to restore the parties to their positions prior to the contract, Defendant Doms should be required to provide a Quit-Claim Deed restoring title to the property to Plaintiffs and Plaintiffs should have been required to refund all monies paid on the contract, including interest payments paid, plus interest. Doms should also be entitled to all taxes paid on the property during the period of time he was in possession of it.

In its Modified Judgment dated July 7, 2001, the trial court did indeed award Doms $10,000.00 earnest money at 10% simple interest from the date of payment which had been paid on the contract, the sum of $72,500.00 at 10% simple interest which constituted the down payment on the contract, and all payments made for taxes on the property at 10% interest. However, the trial court chose not to award Doms monthly interest payments made on the contract, payments which totaled $72,520.00. Although

the trial court opined that had the money been borrowed from any other party Defendant Doms would have had to repay it, Defendant Doms argues that the interest payments made on a monthly basis on the contract (which totaled $72,520.00) were part of the contract requirements.

The mere fact that the contract called for a balloon payment with monthly interest payments being made should not alter the trial court's requirement to restore the parties to their original positions prior to the contract being entered into as ordered by this Court in its June 24, 1999 decision. This Court expressly ordered the repayment of interest payments when it stated that it was instructing the trial court to "determine what is necessary to restore the parties to the status quo at the time the parties entered into the contract . . . we therefore remand this issue to the trial court for a determination and award to Doms of the net payments paid by him less rental value plus interest paid." *See Doms*, 1999 UT App 207, ¶20, 984 P.2d 392 (emphasis added).

Therefore, the trial court erred by refusing to comply with the specific instructions of this Court that Doms was to be awarded "net payments paid by him less rental value plus interest paid." *Id.* This Court should therefore reverse and vacate the Modified Judgment and remand it to the trial court with an Order requiring it to enter Judgment to Defendant Doms for all amounts paid on the contract, including the $72,520.00 paid in monthly payments which constituted interest on the Trust Deed Note prior to the triggering of the balloon payment coming due plus 10% simple prejudgment interest and postjudgment interest on all amounts after a final judgment is entered. This Court should

affirm all other components of the Modified Judgment to be part of a new final judgment to be entered by the trial court upon remand.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY FAILING TO IMPLEMENT THE FINAL DECISION OF THE UTAH COURT OF APPEALS DATED JUNE 24, 1999 IN THIS CASE.

This is the Third Appeal to the Utah Court of Appeals regarding this case which was actually begun in 1985 by the filing of Plaintiffs' (Appellees) Complaint. While it was hoped by Defendant (Appellant) Doms that the June 24, 1999 decision of the Utah Court of Appeals (i.e. *Doms*, 1999 UT App 207, 984 P.2d 392 (Add. 1)) would have been the last necessary appeal in this case, the trial court failed to implement the decision and clear mandate of the Utah Court of Appeals upon remand, necessitating this Third Appeal.

In the Second Appeal, the Court of Appeals clearly held that on remand, the trial court should determine what is necessary to restore the parties to the status quo at the time the parties entered into the contract. *See id.* at ¶20. The Court of Appeals also stated:

> In fashioning an appropriate remedy for rescission, the rule is equitable, and requires practicality in adjusting the rights of the parties. How this is to be accomplished, or indeed whether it can, is a matter which is within the discretion of the trial court under the facts as found to exist by the trier of fact. The trial court therefore has discretion to fashion an adequate and reasonable remedy so that an aggrieved party is

> adequately compensated for its loss, so long as that remedy is not duplicative.

Id.

The Court of Appeals went on to say:

> In this case, Doms apparently made no improvements or changes to the property such that the parties could not be returned to their respective positions prior to entering into the contract. We therefore remand this issue to the trial court for a determination and award to Doms of the net payments paid by him less rental value plus interest. Doms is entitled to a refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and Domcoy.

Id. at ¶20, n. 12.

It was the position of Defendant (Appellant) Doms before the trial court that he should have been awarded all amounts paid to Plaintiffs (Appellees) pursuant to the contract, with interest from the date each payment was made until date of judgment at the prejudgment rate, and thereafter at the post-judgment rate until paid. (R. at 8612.) Defendant Doms also claimed that he should have been awarded all taxes paid on the subject property up to and including the date of actual rescission to be ordered by the lower court with interest from the date each tax payment was made until paid. (R. at 8612.) Doms argued that he should have been awarded the following amounts:

1. $10,000.00 paid as earnest money at 10% interest from the date of payment;

2. $72,500.00 constituting the down payment at 10% interest;

3. Interest payments made on the Trust Deed Note at 10% interest from the date each payment was made, as follows:

a. Payment made April 21, 1982 of $2266.25;

b. Payment made May 24, 1982 of $2266.25;

c. Payment made June 14, 1982 of $2266.25;

d. Payment made July 16, 1982 of $2266.25;

e. Payment made August 25, 1982 of $2266.25;

f. Payment made October 8, 1982 of $4,532.50;

g. Payment made December 22, 1982 of $4,532.50;

h. Payment made December 22, 1982 of $2,266.25;

i. Payment made March 8, 1983 of $2266.25;

j. Payment made April 27, 1983 of $4532.50;

k. Payment made July 8, 1983 of $4532.50;

l. Payment made August 16, 1983 of $4532.50;

m. Payment made October 24, 1983 of $4532.50;

n. Payment made December 15, 1983 of $4532.50;

o. Payment made January 26, 1984 of $2266.25;

p. Payment made April 16, 1984 of $6798.75;

q. Payment made June 21, 1984 of $4532.50;

r. Payment made July 18, 1984 of $2266.25;

s. Payment made August 15, 1984 of $2266.25;

t. Payment made October 1, 1984 of $2266.25;

u. Payment made December 31, 1984 of $4532.50.

(R. at 8614-17.)

Defendant Doms also argued he was entitled to a refund of all taxes paid on the property with interest and presented an exhibit to the trial court that showed the amount of taxes to that date. (R. at 8612.) Defendant Doms agreed that the property should be rescinded by his issuing a Quit-Claim Deed back to Plaintiffs.

However, the trial court chose only to award the $10,000.00 earnest money, the $72,500.00 down payment, and the taxes paid, but refused to award the interest payments made pursuant to the Trust Deed Note. (R. at 8950-51.) The court's refusal to award these interest payments on the contracts amounts to $72,520.00 in payments plus interest, which itself, at a rate of ten percent (10%) over a period of twenty years (the approximate time this money has been in Plaintiffs' possession), totals well over $400,000.00. The trial court's presumptuous and selective reading of this Court's mandate is clearly contrary to the law of the case and contrary to the law in general. *See* the Court's Modified Judgment (Add. 1).

In remanding this case to the lower court for judgment, the decision of the Utah Court of Appeals specifically stated:

> "We therefore remand this issue to the trial court for a determination and award to Doms of the net payments paid by him less rental value plus interest." *Anderson v. Doms*, 1999 UT App 207, ¶21, 984 P.2d 392 (Add 3.).

The Court went on in footnote 12 on page 398 to state "Doms is entitled to a refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and Domcoy." *Id.* at ¶21, n.12.

It seems very clear that the law of the case is that Defendant Doms should be entitled to all monies paid on this contract. The Utah Court of Appeals does not make an exception for interest paid, and therefore the Court's refusal to award the $72,520.00 in payments plus interest is contrary to the law of the case (*see Point II infra*).

The purpose of rescission and restitution[1] is to return the parties to the status quo and to recover the payments made on the contract. "Payments", in context of a land sale, are not limited to earnest money payments but, rather, refer to any benefit the purchaser conferred to the seller.

> The purpose of an equity action is to restore the parties to the status quo to the extent possible, *Horton v. Horton*, 659 P.2d 102 (Utah 1984), or as demanded by the equities in the case, *Forsythe v. Elkins*, 216 Mont. 108, 700 P.2d 596 (1985). In the case of a rescission, the plaintiffs are entitled to be returned to the status quo and to recover the payments made on the contract, less the fair rental value of the premises for the time they had possession thereof. *Farmer v. Groves*, 276 Or. 563, 555 P.2d 1252 (1976); *see also Matanuska Valley Bank v. Abernathy*, 445 P.2d 235 (Alaska 1968); *Benzer v. Continental Dry Cleaners, Inc.*, 548 P.2d 898 (Utah 1976).

---

[1] The terms restitution and rescission are frequently used together, sometimes as if they were synonymous. Cunningham, Stoebuck and Whitman, the Law of Property, § 10.7 (1984). This memorandum will also use the terms synonymously.

Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986) (emphasis added) (affirming trial court's award to purchaser of amounts purchaser paid for real property, including monthly mortgage payments.)

In the case of a seller's breach of a land purchase contract, it is well settled law that rescission requires the seller to return all monies paid by the purchaser (hence, all monies received by the seller), plus interest on those monies, minus a sum representing the fair rental value, if one exists. *See, e.g. Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716 (Utah Ct. App. 1990)(affirming return of all money paid by the purchaser, including interest-only payments, in case of rescission); *Bergstrom v. Moore*, 677 P.2d 1123 (Utah 1984) (affirming award of all amounts paid by purchaser to seller, less rental value, as appropriate remedy for rescission); *Lee v. Yang*, 987 P.2d 519 (Or. App. 1999) (vendor must return all of purchaser's payments where rescission is awarded in a contract for the sale of property); *Robison v. Katz*, 610 P.2d 201 (N.M. App. 1980) (purchaser entitled to return of all consideration paid for land, with interest, in case of rescission of land sales contract); *Farmer v. Groves*, 555 P.2d 1252 (1976) (purchasers entitled to be returned to status quo and to recover payments made on contract in rescission of land sales contract); *Lyerla v. Watts*, 482 P.2d 318 (Nev. 1971) (in case of rescission, purchaser entitled to restitution of amount paid on purchase price under contract of sale); *Matanuska Valley Bank v. Abernathy*, 445 P.2d 235 (Alaska 1968) (upon rescission of land sales agreement, purchaser entitled to return of money paid on purchase price, including interest and any amount expended in payment of taxes, plus interest, in addition to other remedies); *Millor*

v. Remior, 383 P.2d 596 (Idaho 1963) (purchaser entitled to all purchase money paid together with interest thereon from time of payment.) Thus, it is a required component of the law of rescission that rescission, in the context of a land purchase contract, demands return of all money paid to the seller, including interest-only payments.

This required component of rescission comes from the very meaning and purpose of rescission. Rescission "suggests the returning, by a party to a contract, of the performance he or she has received from the other party." Cunningham, Stoebuck and Whitman, The Law of Property, § 10.7 (1984), *citing* 5 Corbin, Contracts § 1102 (1964). Rescission "refers to a judicial order compelling the defendant to return to the plaintiff the value of the performance he or she has rendered, thus returning the plaintiff to the position he had before the contract was formed." Cunningham, Stoebuck and Whitman, the Law of Property, § 10.7 (1984), *citing* 5 Corbin, Contracts § 1112 (1964). "For example, if the purchaser under a land sale contract declares it rescinded because the vendor refuses to convey title as agreed, the purchaser may well seek not only his earnest money and other payments made but also a judgment for loss-of-bargain damages." Cunningham, Stoebuck and Whitman, The Law of Property, § 10.7 (1984) (emphasis added.) Other treatises explaining the purpose of rescission concur. *See e.g.* Restatement of the Law, Second, Contracts § 370 Comment (a) and § 371, Comment (a) (1981) (emphasis added.):

> A party's restitution interest is his interest in having restored to him any benefit available that he has conferred on the other party. . . . The requirement of this section is generally satisfied if a benefit has been

> conferred, and it is immaterial that it was later lost, destroyed, or squandered. . . A party who is liable in restitution for a sum of money must pay an amount equal to the benefit that has been conferred upon him. If the benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount."

Furthermore, the Utah Supreme Court has explicitly ruled that where there is rescission of an agreement involving real property, "the buyers are entitled to be returned to the status quo and to recover the payments made on the contract, less the fair rental value of the premises...." *Dugan v. Jones*, 724 P.2d 955, 957 (Utah 1986)(emphasis added). These payments constitute "lost profit or other related consequential damages," and "include expenses resulting from fraud, loss of good will, any expenditures in mitigation of damages, lost earnings, prejudgment interest, and loss of interest on loans required to finance the business." *ONG Int'l (USA) Ind., v. 11th Avenue Corp.*, 850 P.2d 447, 457 (Utah 1993)(relying on Dan B. Dobbs, *Handbook on the Law of Remedies* § 9.2, at 598-99 (1973) (emphasis added)).

Although the Utah Court of Appeals did not mention this part of the decision in *ONG Int'l* in its own ruling in *Anderson v. Doms* (1999 UT App 207, 984 P.2d 392 (Add. 3.)), it did cite to *ONG Int'l* and it did specifically hold that interest should be awarded on remand. Since *ONG Int'l* states that both types of interest are available as a remedy, and since under the law of the case doctrine the appellate decision must be strictly followed, the trial court clearly erred in failing to award the interest on the contract carried by the sellers, and thus paid of necessity and by agreement to finance the contract until the balloon payment was due.

POINT II

THE TRIAL COURT IS BOUND BY THE LAW OF THE CASE.

The trial court's opinion that "had the money been borrowed from any other party, Defendant Doms would have had to repay it ... (t)he Court cannot see a legal basis for allowing this interest on the trust deed note to be returned to Defendant Doms and so the interest payments shall not be recovered by Doms" is a position directly contrary to the law of rescission and the law of the case as mandated by this Court and is clearly erroneous. (R. at 8950-51.) Neither Plaintiffs' counsel nor the court cited any authority for this proposition, and this conclusion made by the Judge in paragraph 4 of the Modified Judgment is clearly contrary to the law of the case and case law and authority generally on the subject. The Judge's reasoning is flawed because if the money had been borrowed from a third party and paid on this contract, sellers would have still been responsible to Doms for a return of those payments upon rescission.

The law of the case doctrine is something that has been clearly established at Utah law and civil law in general for hundreds of years. Perhaps the best and most recent analysis of the law of the case doctrine appears in the Utah Supreme Court case of *Gildea v. Guardian Title Company of Utah*, 2001 UT 75, ¶9, 31 P.3d 543, as follows:

> "Under the law of the case doctrine, issues resolved by this court on appeal bind the trial court on remand, and generally bind this court should the case return on appeal after remand. *See, e.g. Thurston v. Box Elder County,* 892 P.2d 1034, 1038 (Utah 1995); *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990); *see also* 5 C.J.S. *Appeal & Error* § 849 (1993). The doctrine was developed to promote the obedience of inferior courts as well as 'to avoid the delays and difficulties involved in repetitious contentions and

> reconsideration of rulings on matters previously decided in the same case.' *Thurston*, 892 P.2d at 1037. The effect of abandoning the doctrine in the context of a post-remand appeal to the appellate court would not be inconsequential, because considerable inefficiencies would result if parties were free to relitigate after remand issues decided in an earlier ruling of this court. The doctrine, however, is not applied inflexibly. *Id.* at 1038; *see also* 21 C.J.S. *Courts* § 149(b) (1990). Indeed, this court need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent. *Thurston*, 892 P.2d at 1039. Accordingly, the doctrine will generally not be enforced under the following exceptional circumstances:
>
> > (1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.
>
> *Id.*; *see also* 18 Charles Allen Wright et al., *Federal Practice & Procedure* § 4478, at 790 (1981). Therefore, although the doctrine is not an inexorable command that rigidly binds a court to its former decisions. It is waived only for the most cogent of reasons."

Thus, the only inquiry to be considered by this Court in reviewing the trial court's refusal to award the interest payments made on the real estate contract as outlined in Point I, *supra*, is the three pronged inquiry established under *Gildea*. Clearly, there has been no intervening change of controlling authority; there is no claim that new evidence has become available; and there is no reason the Court should be convinced that its prior decision was clearly erroneous and would work a manifest injustice. Indeed the only manifest injustice or clear error on display in this case belongs to the trial court, which inexplicably refused to follow the mandate of the Utah Court of Appeals to "restore the parties to the status quo at the time the parties entered into the contract" (*Anderson v. Doms*, 1999 UT App 207, ¶20, 984 P.2d 392) and inexcusably failed to allow Doms "a

refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and Domcoy" (*Id.* at ¶21, n. 12).

Not only is there no reason for this Court to depart from the doctrine of the law of the case, but there is every reason in the world for this Court to find that the trial court's refusal to follow the mandate from the Utah Court of Appeals was clearly erroneous and worked a manifest injustice upon Defendant Doms.

CONCLUSION

The Complaint in this case was originally filed by Appellees in 1985. The case has been up to the Utah Court of Appeals on four occasions (on one prior occasion it was remanded as being premature and not ripe for appeal) and up to the Utah Supreme Court three times on one Petition for Interlocutory Relief and two separate Petitions for Certiorari. This appeal, as stated previously, constitutes the third substantive appeal in the case. It is time for this Court to end this seventeen year plus case and issue a mandate back to the district court ordering it to award Doms the $72,520.00 in interest payments plus prejudgment and postjudgment interest at the appropriate legal rates, and to order the trial court to continue to implement as part of that final judgment all other provisions of its Order, including the determination that the property in question had no fair rental value and that Appellees had failed to provide any evidence of such.

Only by this direct mandate to the lower court requiring the specific components of the judgment necessary can this Court rest reasonably assured that no further appeals

will be taken in this case, and that the case will finally end. The interests of justice so dictate.

RESPECTFULLY SUBMITTED.

DATED this 7 day of JUNE, 2002.

COHNE, RAPPAPORT & SEGAL, P.C.

LARRY R. KELLER
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 10th day of June, 2002, to:

Irving H. Biele, Esq.
Attorney at Law
1235 East 2nd South, #301
Salt Lake City, Utah 84102

Larry A. Kirkham
Attorney at Law
871 East 9400 South
Sandy, Utah 84094

ADDENDUMS TABLE OF CONTENTS

ADDENDUM 1

LARRY R. KELLER, #1785
COHNE, RAPPAPORT & SEGAL, P.C.
Attorney for Defendant Eugene E. Doms
525 East 100 South, Fifth Floor
Salt Lake City, Utah 84102
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH
---------ooOoo---------

ELLEN ANDERSON, as Personal, Representative of the Estate of D.C. ANDERSON, DAN SCOTT, ELLEN ANDERSON, personally, and JEANNE SCOTT, Plaintiffs, vs. MICHAEL R. MCCOY AND EUGENE E. DOMS, Defendants.	:	**MODIFIED JUDGMENT**
ELLEN ANDERSON, as Personal, Representative of the Estate of D.C. ANDERSON, DAN SCOTT, ELLEN ANDERSON, personally, and JEANNE SCOTT, Third Party Plaintiffs, vs. SUMMIT COUNTY TITLE COMPANY, a Utah corporation, Third Party Defendant.	:	Civil No. 8339

CONSOLIDATED HEADING CONTINUED ON NEXT PAGE

ELLEN ANDERSON, as Personal representative of the Estate of D.C. ANDERSON; DAN SCOTT; and PAUL D. VEASY, Trustee,

Plaintiffs,

v.

SUMMIT COUNTY, a body corporate and politic of the State of Utah; BLAKE L. FRAZIER, in his official capacity as Summit County Auditor; GUMP & AYERS REAL ESTATE, INC., a Utah corporation; VICTOR R. AYERS; DOMCOY ENTERPRISES, INC., a Utah corporation; EUGENE E. DOMS; UNKNOWN DEFENDANTS DESCRIBED AS JOHN DOES 1, 2, 3, 4, and 5,

Defendants.

Civil No. 10066

----------ooOoo----------

The above-entitled matter came before the Court on June 29, 2000 on Defendant Doms' Motion to Enter Judgment on the June 24, 1999 Decision of the Utah Court of Appeals with Irving H. Biele, Esq. present and representing Plaintiffs and Larry R. Keller, Esq. present and representing Defendant Eugene E. Doms.

This Court finds and determines that despite the efforts on the part of Plaintiffs to continue to argue matters conclusively decided in the June 24, 1999 Decision of the Utah Court of Appeals, and upheld by the Utah Supreme Court when it denied Certiorari in this matter, Judgment according to the Decision of the Utah Court of Appeals should be entered as follows:

1. Recission as ordered by the Court of Appeals is the appropriate remedy in this matter.

2. Defendant Eugene E. Doms has been determined by the Utah Court of Appeals to be fully entitled to all amounts paid under the contract upon its recission, and this Court declines to rule differently than the Utah Court of Appeals on that point since that Court found Doms to be entitled to a refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and DomCoy.

3. Doms shall tender back to Plaintiffs all right, title and interest to the property subject to his receiving the following sums:

   a. $10,000.00 earnest money at 10% interest from the date of payment which shall be the sum of $28,731.51 through August 1, 2000 and $2.74 per day thereafter;

   b. The sum of $72,500.00 constituting the down payment at 10% simple interest which shall be the sum of $205,959.59 through August 1, 2000 and $19.86 per day thereafter;

   c. All payments made for taxes on the property at 10% interest from the date the payment was made which shall be the sum of $23,070.73 through August 1, 2000 and $4.26 per day thereafter.

4. Payments made pursuant to the Trust Deed Note which were interest payments shall not be recoverable by Defendant Doms. It is the Court's opinion that had the money been borrowed from any other party, Defendant Doms would have had to repay it. The Court cannot see a legal basis for allowing this interest on the Trust Deed Note

to be returned to Defendant Doms and so the interest payments shall not be recovered by Doms.

5. The Court of Appeals has directed this Court to reduce the Judgment by fair rental value; however the Court finds that the record is completely devoid of any basis for rental value for this raw ground which had never been used in any way by Defendant Doms. Therefore the Court declines to reduce the Judgment in this case by any rental value, finding there is no fair rental value to be placed upon the property.

6. The Court chooses not to revisit the attorney's fees issue as such fees were necessary to set aside the Default Judgment in this case; therefore no award is made for recovery of said attorney's fees by Defendant Doms.

7. This Court finds that there has been an unwillingness on the part of Plaintiffs to accept the Decision of the Court of Appeals, and although the Court does not believe that Plaintiffs' counsel has intentionally attempted to mislead it, there clearly has been a breach of Rule 11 with regard to arguments made by counsel and the sum of $500.00 is awarded as attorney's fees to Defendant Doms.

Deleted See minute entry this date

8. All amounts awarded here shall bear judgment at the legal post-judgment interest rate from the date this Judgment is entered.

DATED this 7th day of July, 2001~~2000~~.

BY THE COURT:

ROBERT HILDER
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

ADDENDUM 2

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

ELLEN ANDERSON, *et al*,

Plaintiffs,

vs.

MICHAEL R. McCOY, *et al*,

Defendants.

MINUTE ENTRY

Civil No. 850698339

Judge Robert K. Hilder

This matter is before the court for decision of numerous pending motions, all connected with this court's bench Ruling of June 29, 2000. To the court's surprise and consternation, *four* Notices to Submit have been filed. The court cannot fully explain the course of events that has created this unprecedented (for this court) circumstance, but until receipt of Mr. Keller's June 26, 2001, letter, on July 5, 2001, the court was completely unaware of the last three Notices.

As noted, the matter was argued and decided on June 29, 2000. Thereafter, a proposed judgment was submitted and the file placed on the judge's desk. Mr. Biele then contacted the court and indicated that he would be traveling, and he requested a modest extension to file additional pleadings. Because the judge was about to leave the country for almost two weeks, Mr. Biele was advised that the matter would not be decided immediately in any event. The file was set aside in the judge's Coalville office. Over the next couple of months, numerous additional pleadings were filed, but the judge never saw another Notice to Submit, and in time the case was overlooked in the press of other matters. The judge should have realized the case was languishing, but he did not, and the court now offers its sincere apologies to all parties and both counsel for the unconscionable delay.

For ease of reference only, the court will refer to the parties as Anderson and Doms. The matters before the court are numerous, but related. Doms' proposed Judgment was resubmitted in a modified form to address Anderson's Objection to certain interest calculations. The court finds the Objection was correct in principle, and the modification resolved the problem. Accordingly, the court has this date signed the Modified Judgment as proposed, except that the court has deleted paragraph 7 for the reasons stated below.

Doms has also moved, pursuant to Rule 59, Utah Rules of Civil Procedure, to amend that portion of the judgment that denies repayment of Doms' interest payment on the loan from plaintiffs. For the reasons stated at the hearing, and generally in accord with the "dual capacity"

reasoning articulated in Anderson's opposition to the Motion, the court denies the Motion and affirms its prior decision, which is now set forth in the signed Modified Judgment.

Anderson has filed several motions which all, in essence, ask the court to change its ruling. They include a Motion to Correct, Modify, or Reconsider, a Motion to Expand or Broaden the Proposed Judgment, and a "Corrected" Motion to Expand, etc. They are all either motions to amend or reconsider. A centerpiece of all is the continued assertion that there is no basis to find that Doms is successor-in-interest to McCoy and DomCoy A second part of each Motion is a request that the court reconsider its imposition of Rule 11 sanctions, in the form of an award of $500 attorney's fees.

The court shares Doms' counsel's inability to understand why Mr. Biele continues to urge a position that seems so completely at odds with the law of the case so bluntly stated by the Utah Court of Appeals, but ironically, his continued assertions cause this court to question its basis for imposing Rule 11 sanctions. Mr. Biele seems to sincerely believe that (1) there is no factual basis for the successor-in-interest conclusion and, (2) even if that is the law of the case, the charge to this court is to restore Doms to *his* position before the events underlying this case occurred, and that position does not include any consideration of the position of the parties to whose interests he succeeded. While this court does not believe it has any such latitude, and that Doms is now, for all intents and purposes, McCoy and DomCoy, the court cannot find the repeated and unavailing argument was urged maliciously or in bad faith. Accordingly, the Rule 11 finding is vacated.

The court specifically instructs Mr. Biele, however, that he is not to raise the successor-in-interest argument at the trial court level again, unless he has successfully argued the matter on some subsequent appeal and the terms of remand specifically permit such argument. Any violation of this instruction shall result in the imposition of sanctions in an amount to be determined.

Except for the Rule 11 issue, Anderson's several Motions are without merit, and are DENIED. The Modified Judgment is the entered this date. This signed Minute Entry shall be the Order of the court, and no further Order is required unless counsel for Doms feels he needs some additional formal order to ensure finality of at least this stage of the proceedings, in which case he may submit an Order consistent with this Minute Entry.

DATED this 7th day of July, 2001.

By the Court:

Robert K. Hilder, District Court Judge

THIRD JUDICIAL DISTRICT COURT SUMMIT COUNTY OF UTAH

ADDENDUM 3

gious to permit the imposition of the death penalty. *See State v. Archuleta*, 850 P.2d 1232, 1248 (Utah 1993) ("we can confidently say beyond a reasonable doubt that even if the jury had not considered the invalid aggravator, it would have returned a verdict of death"), *cert. denied*, 510 U.S. 979, 114 S.Ct. 476, 126 L.Ed.2d 427 (1993). The trial court found overwhelming aggravating evidence and rejected all of Lovell's mitigation theories. As in *Archuleta*, leaving out the "personal gain" aggravator would not have reduced Lovell's sentence, so any error is harmless beyond a reasonable doubt.

INEFFECTIVE ASSISTANCE

[14] ¶ 46 Lovell claims that his trial counsel performed ineffectively because he did not raise the constitutional challenges to the specific aggravating circumstances that Lovell raises on appeal. In order to prove his claim, Lovell must identify specific acts or omissions by counsel which fell below an objective standard of reasonableness, overcoming the presumption that counsel rendered constitutionally adequate assistance. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, under *Strickland*, Lovell must also affirmatively prove that the challenged acts or omissions undermine confidence in the outcome of his trial. *See Id.* at 694, 104 S.Ct. 2052. As we have discussed, Lovell's counsel had no basis on which to challenge the constitutionality of the death penalty statute, including the specific aggravators. The constitutionality of the statute has been upheld by this Court, so counsel had no reason to believe he could make a legitimate constitutional challenge. As we have noted, the trial court could and did consider all the evidence in the case under the general sentencing provision, without relying explicitly on the specific aggravators *as* aggravators challenged by Lovell. Lovell fails to establish that his counsel's failure to challenge the statutory provisions fell below an objective standard of reasonableness. Therefore, Lovell's claim does not overcome the strong presumption that counsel performed adequately. Lovell's constitutional claims must fail.

CONCLUSION

¶ 47 Because we find that all of Lovell's claims fail, we affirm his conviction and sentence of death.

Chief Justice HOWE, Justice STEWART, Justice ZIMMERMAN, and Justice RUSSON concur in Associate Chief Justice DURHAM's opinion.

1999 UT App 207

Ellen ANDERSON, as personal representative of the Estate of D.C. Anderson; Dan Scott; Ellen Anderson, personally; and Jeanne Scott, Plaintiffs, Appellees, and Cross appellants,

v.

Eugene E. DOMS and Michael R. McCoy, Defendants, Appellant, and Cross appellee.

No. 971762–CA.

Court of Appeals of Utah.

June 24, 1999.

Vendors brought suit for foreclosure based on default on trust deed note given to secure balance owed on purchase price. Purchaser counterclaimed for rescission or damages for breach of implied covenants, breach of contract, fraud, and misrepresentation. Following bench trial, the District Court denied request for rescission based upon laches and awarded purchaser monetary damages as result of encumbrances on property. The Court of Appeals remanded for additional findings on laches. On remand, the District Court again held that laches barred rescission and awarded attorney fees and costs. Both sides appealed. The Court of Appeals, Greenwood, J., held that: (1) vendors did not suffer requisite prejudice to support laches bar to rescission claim; (2) rescission was appropriate remedy for vendors' breach of covenant; (3) there was no statutory or contractual basis to support award of fees and costs to purchaser; and (4) vendors were entitled to fees incurred in securing default judgment on foreclosure claim that was subsequently vacated.

Reversed and remanded.

Bench, J., dissented.

1. Appeal and Error ⇐1008.1(8.1)

Although the determination of whether a party was prejudiced for purposes of the doctrine of laches is a legal conclusion that is reviewed for correctness, trial court's findings of fact underlying that conclusion will not be set aside unless they are clearly erroneous.

2. Appeal and Error ⇐842(1)

Whether attorney fees are recoverable is a question of law which is reviewed for correctness.

3. Appeal and Error ⇐1024.1

The sufficiency of a trial court's findings supporting an award of attorney fees is reviewed under a correction-of-error standard.

4. Appeal and Error ⇐757(3)

Appellant was relieved of his burden to marshal evidence by reason of inadequacy of trial court's findings, which were unsupported in record or did not support ultimate conclusion on issue of laches.

5. Vendor and Purchaser ⇐119

Purchaser's failure to pay taxes on property and resulting tax sale did not prejudice vendors, so as to support laches bar based on purchaser's delay in seeking rescission of real estate contract, where tax sale was ultimately declared void and purchaser paid taxes and regained title to property.

6. Vendor and Purchaser ⇐119

Delay in seeking rescission of real estate contract did not prejudice vendors through loss of witnesses or evidence, so as to raise laches bar to rescission claim, despite death of one vendor in interim, absent proof that vendors were deprived, to their prejudice, of any specific evidence or testimony.

7. Vendor and Purchaser ⇐119

Loss in value of property did not by itself show that vendors were prejudiced by purchaser's delay in bringing rescission action, so as to raise laches bar to rescission claim.

8. Equity ⇐72(4)

Increase or decrease in the value of property alone does not satisfy the prejudice prong of the laches defense.

9. Vendor and Purchaser ⇐119

Trial court's finding that it would be inequitable to allow purchaser to rescind contract because he would benefit from his poor decisions, was moral judgment, not fact finding, and did not support conclusion that vendors were prejudiced by purchaser's delay in seeking rescission of contract and that rescission was accordingly barred by laches.

10. Vendor and Purchaser ⇐119

Purchaser's failure to make payments under trustee deed note did not show that vendors were prejudiced by purchaser's failure to perform, so as to impose laches bar based on purchaser's delay in bringing rescission action, where any prejudice was precipitated by vendors' breach of covenant against encumbrances.

11. Vendor and Purchaser ⇐119

Absent proof that vendors were prejudiced by purchaser's several year delay in bringing action to rescind real estate purchase contract, laches did not bar relief.

12. Vendor and Purchaser ⇐110

Rescission of contract was proper remedy for vendor's breach of covenant against encumbrances.

13. Vendor and Purchaser ⇐126

Upon rescission of contract for vendor's breach of warranty in case in which purchaser made no significant improvements or changes to real property, purchaser was entitled to return of net payments made on trust deed note less rental value of property plus interest.

14. Costs ⇐194.16

Attorney fees are recoverable only if there is a statutory or contractual basis for awarding such fees.

15. Covenants ⇐132(2)

Purchaser who was successful in obtaining rescission of real estate contract based on breach of covenant against encumbrances was not entitled to award of fees, as there was no statute or contractual provision justifying award for rescission remedy and purchaser did not incur attorney fees in any attempt to remove encumbrances.

16. Mortgages ⇐580, 581(3)

Vendors were entitled to attorney fees and costs incurred in securing default judgment in foreclosure action against purchaser under trust deed note, but not to other fees incurred in litigation after default judgment was vacated, as purchaser ultimately prevailed.

Larry R. Keller, Keller & Lundgren Lc, Salt Lake City, for Appellant.

Irving H. Biele and Curtis C. Nessett, Nygaard, Coke & Vincent, Salt Lake City, for Appellees.

Before GREENWOOD, Associate P.J., and BENCH and DAVIS, JJ.

OPINION

GREENWOOD, Judge:

¶ 1 Defendant Eugene E. Doms appeals for the second time the trial court's denial of his request to rescind a real estate contract. Plaintiffs Ellen Anderson and Dan and Jeanne Scott cross-appeal, arguing, among other things, that the doctrine of laches bars recission of the contract.[1] Both parties appeal the trial court's award of attorney fees and costs. We reverse and remand.

BACKGROUND

¶ 2 In March 1982, plaintiffs Dan and Jeanne Scott, Ellen Anderson, and D.G. Anderson, Ellen Anderson's now deceased husband, sold a parcel of property known as Rossi Hills (the property) in Park City, Utah, to Doms and Michael R. McCoy for residential development. In connection with this sale, plaintiffs executed a Warranty Deed that included a covenant against encumbrances. Doms and McCoy executed a Trust Deed and Trust Deed Note to secure payment of the balance owed on the purchase price of $194,250. Doms and McCoy also acquired an interest in a parcel adjoining the property known as the "slipper parcel." McCoy no longer has any interest in the property and is not involved in this appeal.

¶ 3 In late 1984 or early 1985, Doms's attorney informed him that several encroachments and easements existed on the property.[2] As a result, Doms did not make the scheduled payments on the property and attempted to deed the property back to plaintiffs in return for cancellation of the Trust Deed Note. Plaintiffs did not respond to this offer and, in June 1985, filed a complaint seeking to foreclose on the property. Two years later, plaintiffs obtained a default judgment against Doms and McCoy because they failed to file an answer in response to plaintiffs' complaint. Nine days after entry of the default judgment, Doms filed an answer and counterclaim to plaintiffs' complaint. Approximately four months later, the trial court entered an order setting aside the default judgment against Doms on the condition that Doms pay all attorney fees incurred by plaintiffs in obtaining the default judgment. However, the court reserved a final ruling on the award of these fees until final disposition of the case on the merits.

¶ 4 In May 1987, the property was sold to Summit County in a foreclosure sale for the nonpayment of property taxes. At that time, title to the property was held by Domcoy, a corporation formed by Doms and McCoy, to hold the property. However, according to Doms, it was not until approximately two years after the purchase of the property that he learned of the legal significance of the encumbrances on the property, which they had transferred their interest in the property. After Doms paid all delinquent taxes, penalties, interest, and costs, Summit County conveyed the property to Domcoy by quitclaim deed. Domcoy then conveyed the property to Doms.[3] In the meantime, plaintiffs had filed another action challenging the tax sale and subsequent purchase of the property by Summit County, seeking to quiet title to the property in their favor. Upon stipulation of Summit County, plaintiffs, and Doms, the trial court set aside the tax sale.

¶ 5 In early 1988, Doms amended his counterclaim, seeking rescission of the contract or, in the alternative, damages for breach of implied covenants, breach of contract, fraud, and misrepresentation. In 1990, the trial was bifurcated and a three day trial was held on the issue of rescission of the contract. Plaintiffs argued, on the basis of laches, that Doms was prohibited from rescinding the contract because there was an unreasonable delay between the time Doms learned of the basis for rescission and his attempt to rescind the contract. The trial court subsequently issued a Memorandum Decision, finding that because Doms unreasonably delayed seeking rescission, laches barred rescission of the contract.

¶ 6 The remainder of the trial focused on the issue of whether Doms was entitled to damages as a result of the encumbrances on the property. The trial court also held a hearing on the issue of attorney fees. In its Second Amended Findings of Fact and Conclusions of Law and Second Amended Judgment, the trial court, based upon laches, denied Doms's request for rescission and awarded Doms $83,000 in damages as a result of the encumbrances on the property and $101.50 in costs. The trial court also awarded $41,333.20 in attorney fees and costs, plus interest, to plaintiffs.

¶ 7 Both parties appealed the trial court's decision on several grounds. This court subsequently issued an unpublished Memorandum Decision holding that the trial court improperly applied the doctrine of laches to bar rescission of the contract without first entering findings of fact regarding whether plaintiffs were prejudiced by Doms's delay in seeking rescission. *See Anderson v. Doms*, No. 920653–CA, slip op. at 2–3 (Utah Ct.App. Nov. 4, 1994) (unpublished mem. decision). Consequently, this court remanded the case to the trial court for further findings on the issue of prejudice, stating, "If the trial court cannot find from the evidence presented that the [plaintiffs] were prejudiced by the delay, the equitable doctrine of laches should not bar the remedy of rescission." *Id.* On remand, the trial court again refused to rescind the contract, concluding plaintiffs were prejudiced by Doms's delay in seeking rescission. This appeal followed.

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 8 Doms argues he is entitled to rescission because the trial court's findings on remand do not support its conclusion that plaintiffs were prejudiced by his delay in seeking rescission of the contract. *See Borland v. Chandler*, 733 P.2d 144, 147 (Utah 1987) ("To successfully assert a laches defense, a [party] must establish both that the [other party] unreasonably delayed in bringing an action [to rescind the contract] and that the defendant was prejudiced by that delay." (citing *Papanikolas Bros. Enter. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1260 (Utah 1975))). Although the determination of whether a party was prejudiced for purposes of the doctrine of laches is a legal conclusion that we review for correctness, we will not set aside a trial court's findings of fact underlying that conclusion unless they are clearly erroneous. *See Sweeney Land Co. v. Kimball*, 786 P.2d 760, 761 (Utah 1990).

[2, 3] ¶ 9 Doms also challenges the trial court's award of attorney fees and costs. Whether attorney fees are recoverable is a question of law which we review for correctness. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 314 (Utah 1998) (citing *Robertson v.*

1. Because the resolution of whether laches bars rescission in this case is dispositive, we do not address plaintiffs' alternative arguments.

2. Before purchasing the property, Doms was aware of the existence of several roads and sheds

3. On remand, the trial court found that the conveyance of the property from Summit County to Doms after the tax sale resulted in Doms holding "clear title to the property." Therefore, plaintiffs' arguments premised on the contention that Doms did not hold title to the entire parcel are without merit.

Gem Ins., 828 P.2d 496, 499 (Utah Ct.App. 1992)). The sufficiency of a trial court's findings supporting an award of attorney fees is also reviewed under a correction-of-error standard. *See id.* Finally, although trial courts are normally afforded broad discretion in determining what constitutes a reasonable fee, *see id.*, such an award "'must be based on the evidence and supported by findings of fact.'" *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996) (quoting *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992)).

ANALYSIS

I. Findings of Fact

[4] ¶ 10 In challenging the trial court's findings of fact, Doms argues he should be relieved of his burden to marshal the evidence because of the inadequacy of the trial court's findings. *See Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct.App.1991) ("There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningfully challenged as factual determinations."). We agree. Because the findings Doms challenges are either unsupported in the record or do not support the conclusion that plaintiffs were prejudiced, we agree that Doms is, for the most part, relieved of the marshaling requirement. We therefore address Doms's specific challenges to the trial court's findings of fact.

A. Finding 10a [4]

¶ 11 Finding 10a provides that plaintiffs were prejudiced because Doms has an interest in the slipper parcel and would likely refuse to cooperate with plaintiffs in developing the adjoining property. However, plaintiffs do not dispute that Doms's interest in the slipper parcel was extinguished at a tax sale. Because this finding is inaccurate and without record support, it is clearly erroneous and has no relevance to the issue of prejudice.

B. Finding 10b [5]

[5] ¶ 12 Finding 10b states that plaintiffs were prejudiced as a result of Doms's failure to pay taxes on the property. However, we cannot see how failure to pay property taxes prejudiced plaintiffs. Doms ultimately paid the taxes and regained title to the property. Further, all parties stipulated that the tax sale was void and that plaintiffs' trust deed was a valid lien on the property. Thus, finding 10b does not support the trial court's conclusion that plaintiffs were prejudiced by Doms's delay.

C. Findings 10c [6] and 10d [7]

[6] ¶ 13 Findings 10c and 10d both state that Doms's delay in seeking rescission resulted in the unavailability of witnesses. Although it is true that one party to the original transaction, D.C. Anderson, had died and other witnesses may have become unavailable or forgotten information relevant to the sale of the property, these findings do not demonstrate that plaintiffs were deprived of any specific evidence or testimony or how lack of that evidence would adversely affect plaintiffs. Because Findings 10c and 10d are conclusory and do not include any information about testimony that plaintiffs could not elicit as a result of the delay, these findings do not support the trial court's conclusion of prejudice.

¶ 14 Finding 10d also states that plaintiffs were prejudiced because Doms's delay prevented them from resolving the encroachments on the property. However, plaintiffs have not shown how Doms's delay made removing the encroachments any more difficult than it would have been before the sale of the property or in the event plaintiffs reacquire the property. Thus, finding 10d does not show that plaintiffs were prejudiced by Doms's delay.

D. Findings 10e [8] and 10f [9]

[7, 8] ¶ 15 Findings 10e and 10f state that plaintiffs were prejudiced because the property suffered a fifty percent decrease in value during the time that Doms possessed it. The first time this case was appealed, we specifically rejected the argument that an increase or decrease in the value of property alone satisfies the prejudice prong of the laches defense. *See Child v. Child*, 8 Utah 2d 261, 271, 332 P.2d 981, 988 (Utah 1958) (stating "natural increment" in value of property does not, standing alone, constitute prejudice for purposes of laches doctrine); *see also West Los Angeles Inst. for Cancer Research v. Mayer*, 366 F.2d 220, 228 (9th Cir.1966) (same). Rather, a change in property value is only *one* factor a court may consider in determining prejudice for the purpose of laches. *See Lawson v. Haynes*, 170 F.2d 741, 744 (10th Cir.1948); *Filler v. Richland*, 247 Mont. 285, 806 P.2d 537, 540 (1991); *Jacobson v. Jacobson*, 557 P.2d 156, 159 (Utah 1976). Therefore, the trial court's finding that the property suffered a decrease in value does not, in and of itself, show that plaintiffs were prejudiced by Doms's delay.

E. Finding 10g [10]

[9] ¶ 16 Finding 10g states that it would be inequitable to allow Doms to rescind the contract because he "should not benefit from his poor decisions." Because this statement appears to be nothing more than a moral judgment, unsupported by any evidence or law, we cannot say that it supports the trial court's conclusion that plaintiffs were prejudiced.

F. Finding 10h [11]

[10] ¶ 17 Finding 10h, actually a legal conclusion, states that Doms may not rescind the contract because he was in default. We disagree. Although Doms failed to make payments required by the Trust Deed Note, he was excused from doing so as a result of plaintiffs' breach of the covenant against encumbrances. *See Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah Ct.App. 1994) ("The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party.") (citing *Saunders v. Sharp*, 840 P.2d 796, 806 (Utah Ct.App.1992)); *Wright v. Westside Nursery*, 787 P.2d 508, 516 (Utah Ct.App.1990); *Bergstrom v. Moore*, 677 P.2d 1123, 1125 (Utah 1984) ("If it plainly appears that a seller has lost or encumbered his ownership so that he will not be able to fulfill his contract, he cannot insist that a buyer continue to make payments."). Any prejudice that resulted from Doms's failure to make payments pursuant to the Trust Deed Note was precipitated by plaintiffs' breach of warranty. Because plaintiffs may not breach the contract and then claim they were prejudiced by Doms's failure to perform, this finding does not support the trial court's conclusion that plaintiffs were prejudiced.

4. Finding 10a states: "Doms had the use and benefit of the property to the exclusion of the plaintiffs. He purchased the slipper parcel and attempted to formulate a plan for a three-parcel integrated development, but was unsuccessful. The plaintiffs are now foreclosed from developing an integrated development because Doms has an interest in the slipper parcel and the likelihood of Doms['s] cooperation with the plaintiffs in an integrated development is remote."

5. Finding 10b states: "Doms failed to pay the property taxes for the years 1982, 1983, 1984, 1985 and 1986, which resulted in a tax sale and by the lapse of time."

6. Finding of fact 10c states: "D.C. Anderson, one of the principals in the transaction, died while Doms was in possession of the property, thus making it impossible to elicit testimony from the decedent."

7. Finding of fact 10d states: "Doms['s] delay of more than six (6) years before he sought to rescind the transaction adversely affected the plaintiffs' opportunity to resolve the encroachment and easement problems because witnesses would be unavailable and memories are dimmed

8. Finding of fact 10e states: "During the time Doms, Domcoy Enterprises, Inc. and Summit County were in possession of the property, the property suffered a 50% reduction in its value."

9. Finding of fact 10f states: "Doms['s] inexperience in developing property or inability to sell the property impacted the plaintiffs greatly because of down turn in the real estate market and the increased costs to develop the property if they chose to do so."

10. Finding of fact 10g states: "Doms should not benefit from his poor decision at the expense of the plaintiffs. To allow that to happen would be inequitable."

11. Finding of fact 10h states: "Doms was in default; therefore, he could not invoke the doctrine of rescission."

[11] ¶ 18 In our previous Memorandum Decision in this case, we stated that [i]f the trial court cannot find from the evidence presented that the appellants were prejudiced by the delay, the equitable doctrine of laches should not bar the remedy of rescission' *Anderson v Doms*, No 920653–CA, slip op at 3 (Utah Ct.App Nov 4 1994) (unpublished mem decision) Having concluded the trial court's findings do not show that plaintiffs were prejudiced, we next address the remedy of rescission

II Rescission

[12] ¶ 19 The only theory plaintiffs advance on appeal to bar rescission of the contract is laches This theory fails, however because plaintiffs have not shown any prejudice Therefore, Doms is entitled to rescind the contract as a remedy for breach of warranty Indeed, this remedy is consistent with Utah case law and that of other jurisdictions *See e g*, *Bergstrom v Moore*, 677 P 2d 1123, 1125 (Utah 1984) (granting rescission when seller breached covenant against encumbrances and stating, "mere knowledge of encumbrances would not be sufficient to exclude them from the operation of the statutory covenant against encumbrances") (citing *Jones v Grow Inv. & Mortgage Co*, 11 Utah 2d 326, 358 P.2d 909 (1961)), *Breuer–Harrison, Inc. v Combe*, 799 P.2d 716, 725 (Utah Ct.App.1990) (affirming rescission of contract where, although buyers were aware of encumbrance on property before purchase, they did not understand the legal implications of such encumbrance until five years after purchasing the property).

[13] ¶ 20 On remand, the trial court should determine what is necessary to restore the parties to the status quo at the time the parties entered into the contract. *See Bergstrom*, 677 P.2d at 1125 (affirming rescission of contract and placing parties in original positions by allowing recovery of payments already made under contract). In fashioning an appropriate remedy for rescission, the rule is equitable, and requires practicality in adjusting the rights of the parties. How this is to be accomplished, or indeed whether it can, is a matter which is within the discretion of the trial court under the facts as found to exist by the trier of fact The trial court therefore has discretion to fashion an adequate and reasonable remedy so that an aggrieved party is adequately compensated for its loss, so long as that remedy is not duplicative

Ong Int'l (U.S.A.) Inc v 11th Ave Corp 850 P 2d 447, 457 (Utah 1993) (citation & emphasis omitted).

¶ 21 In this case, Doms apparently made no improvements or changes to the property such that the parties could not be returned to their respective positions prior to entering into the contract. We therefore remand this issue to the trial court for a determination and award to Doms of the net payments paid by him less rental value plus interest.[12] *See Bergstrom*, 677 P.2d at 1125.

III Attorney Fees and Costs

[14, 15] ¶ 22 Both parties appeal from the trial court's award of attorney fees and costs Attorney fees are recoverable only if there is a statutory or contractual basis for awarding such fees *See Foote v Clark*, 962 P 2d 52, 54 (Utah 1998) (stating attorney fees will be awarded only when contract or statute provides basis for award) Although Doms requests fees for pursuing his rescission remedy, he cites no statute or contractual provision to justify such an award Furthermore, because Doms has not incurred attorney fees to remove the encumbrances on the property, he is not entitled to fees and costs incurred in conjunction with breach of the covenant against encumbrances *See Forrer v Sather*, 596 P 2d 1306, 1308–09 (Utah 1979) (holding party may recover attorney fees in connection with breach of covenant against encumbrance only "where the plaintiff purchased or extinguished the outstanding incumbrance" but not for fees in an action against the covenantor for breach of the covenant). We therefore do not award any attorney fees to Doms

[16] ¶ 23 Regarding the trial court's award of fees and costs to plaintiffs, we affirm the trial court's award of fees and costs incurred in obtaining the default judgment *See Dixonweb Printing Co v Photo Intercept Coupon Sys*, 94 Civ 7436(MBM)(RLE), 1995 WL 384415, at *6 1995 U S Dist LEXIS 8871, at *15 (S D N Y June 27, 1995) (affirming award of attorney fees and costs to plaintiffs in obtaining default judgment "whether or not defendant's conduct is willful") However, because plaintiffs are not the prevailing party, we vacate all other awards to plaintiffs *See Loosle v First Fed. Sav & Loan Ass'n*, 858 P.2d 999, 1003 (Utah 1993) (denying request for attorney fees because no basis for award in connection with quiet title action where promissory note and trust deed provided only for attorney fees incurred in foreclosure) Thus, we remand to the trial court for consideration of plaintiffs' counsel's evidence regarding reasonable fees incurred in connection with obtaining the default judgment and an appropriate award based on that evidence

CONCLUSION

¶ 24 The trial court's findings on remand did not adequately show that plaintiffs were prejudiced by Doms's delay in seeking rescission of the contract Furthermore, rescission of the contract in this case is consistent with Utah case law , Accordingly, the trial court should order rescission and determine an appropriate remedy in connection with rescinding the contract. We affirm the trial court's denial of attorney fees to Doms We also affirm the trial court's fee award to plaintiffs incurred in connection with obtaining the default judgment but vacate all other attorney fee awards to plaintiffs. Both parties shall bear their respective attorney fees incurred on appeal

¶ 25 Reversed and remanded

¶ 26 I CONCUR: JAMES Z. DAVIS, Judge

¶ 27 I DISSENT RUSSELL W BENCH, Judge

WEST KEY NUMBER SYSTEM

NEWSPAPER AGENCY CORPORATION
Petitioner

v

DEPARTMENT OF WORKFORCE SERVICES and Teresa Ortiz,
Respondents

No 981369–CA

Court of Appeals of Utah

July 9 1999

Claimant sought unemployment insurance benefits following separation from employment The Department of Workforce Services denied benefits, and claimant appealed The Workforce Appeals Board reversed, granted benefits and held that employer was responsible for its share of benefit costs Employer appealed The Court of Appeals, Orme, J , held that (1) claimant's appeal was timely filed, and (2) employer was not relieved of its assessed share of cost of claimant's unemployment benefits

Affirmed

1 Appeal and Error ⇐842(1)

The interpretation of statutes that raise questions of law are reviewed for correctness

2 Administrative Law and Procedure ⇐391

The Court of Appeals grants an administrative rule a presumption of validity in determining whether the rule is consistent with governing statutes

12 Doms is entitled to a refund of monies paid as one of the original buyers of the property, and as the successor in interest to McCoy and Domcoy